Supreme Court of the United States

OCTOBER TERM, 1960

No.

MOSES DANIEL COHAN, HENRY I. COHAN,
and ESSIE M. COHAN,

Petitioners,

against

CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, The City of New York, for its statement in opposition to petitioners' application for a writ of certiorari, respectfully shows the following:

1. Statement of Issue

Petitioners seek review of an order granting the respondent's application for condemnation of real property. The order of condemnation, concededly, is not a final judgment and, we shall argue, is not within the scope of this Court's power to review.

2. Facts

This proceeding was brought in the Supreme Court of the State of New York to secure (1) condemnation of a site for the New York City Terminal Market, and (2) an assessment of damages for the property acquired (R. 6).

Petitioners herein opposed the application for condemnation on the ground that the proposed taking was not for public use because parts of the market area are to be rented to fruit and vegetable dealers and an automobile service station (R. 20-21). The Condemnation Court granted the application.

Petitioners then appealed to the Appellate Division of the New York Supreme Court. The appeal was dismissed for lack of jurisdiction, under our special condemnation statute, over an intermediate order in condemnation (Petition, Appendix, p. 12, reported in 12 A. D. 2d 745 [1st]). Thereafter, motions for leave to appeal to the Court of Appeals, the highest state court, were successively denied by the Appellate Division and the Court of Appeals.

In this Court, petitioners seek issuance of a writ of certiorari to the Court of Appeals of the State of New York. (Petitioners' misdescription of this application as one seeking issuance of a writ to the United States Court of Appeals for the Second Circuit was corrected by petitioners' letter to the Clerk of this Court, dated May 17, 1961).

ARGUMENT

Petitioners apply for a writ of certiorari to review an intermediate order in a state condemnation proceeding. The challenged order, a non-final determination, is not within the purview of the statute empowering this Court to grant a writ of certiorari.

(1)

This Court may issue a writ of certiorari for the review only of a final judgment or decree. 28 U.S.C. § 1257. The intermediate nature of the challenged order of condemna-

tion is beyond dispute. Petitioners' motion papers (p. 4) to the Court of Appeals conceded its non-final character. The restriction of certiorari to a final determination is based on a policy of rejecting "piecemeal litigation", and has been repeatedly upheld by this Court in condemnation proceedings. *Catlin* v. *United States*, 324 U. S. 229, 233 (1945). It is applicable alike to federal or state condemnation proceedings. Indeed, this Court has stated that it will not review an intermediate order in condemnation, even though it is appealable by right of local statute. *Ibid.* As noted, the special statute governing eminent domain in the City of New York bars review of intermediate orders.

(2)

Petitioners argue (Pet., pp. 8-9) to the issue of whether a terminal market serves a public purpose. Though this issue is premature, we note that the Special Term of our Supreme Court, in granting condemnation, observed that municipal use of land for a public market is supported by precedents in colonial charters given to our City, and by contemporary studies that document the need for a municipal wholesale produce terminal, strategically located and specially designed to serve the requirements of an off-mainland metropolis (R. 23-25). It is in such a situation as this, we submit, where this Court has expressed reluctance to interfere with the findings of local authorities and tribunals, made in response to indigenous conditions. *Clark* v. *Nash*, 198 U. S. 361, 368 (1905); *United States ex rel. T.V.A.* v. *Welch*, 327 U. S. 546, 552 (1946).

CONCLUSION

The petition for a writ of certiorari should be denied.

May 22, 1961.

Respectfully submitted,

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